

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Executive Homes
Minnesota, LLC

**DENIAL OF MOTION FOR
SUMMARY DISPOSITION**

This matter comes before Administrative Law Judge Raymond R. Krause on a Motion by Executive Homes Minnesota, LLC (Respondent) for Summary Disposition or, in the alternative, for an Order granting a Continuance. Respondent filed its Motions with the Office of Administrative Hearings on February 1, 2007. On February 7, 2007, the Department of Labor and Industry (Department) filed with the Office of Administration its Response Opposing Respondent's motions. No argument on the motions was heard. At a pre-hearing conference on February 8, Respondent's motion for a continuance was denied. Respondent was given five business days to reply to the Department's response and filed its Reply on February 14, 2007 at which time the record on the motion closed.

Christopher M. Kaisershot, Assistant Attorney General, NCL Tower, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Labor and Industry. James Peirce, the former manager of Executive Homes Minnesota, LLC, 331 2nd Street W., Hector, Minnesota 55342, represented Respondent.

Based upon all of the filings in this case and for the reasons set out in the accompanying Memorandum:

Respondent's Motion for Summary Disposition in this matter is DENIED.

Dated this 21st day of February, 2007

s/Raymond R. Krause
RAYMOND R. KRAUSE
Chief Administrative Law Judge

MEMORANDUM

Factual Background

On September 15, 2005, the Department issued Respondent a residential building contractor's license pursuant to Minn. Stat. § 326.84 (2004). On October 15, 2005, Respondent obtained a building permit to construct a four-plex townhouse ("Townhouse") in the City of Nicollet ("City").¹ In a letter dated April 20, 2006, the City Administrator for the City wrote to the Department citing a number of structural concerns he and the Nicollet City Council had about the Townhouse project. The letter stated, among other things, "[t]he Nicollet City Council is concerned about the safety and welfare of any of our residents who may purchase these homes."²

Although the parties engaged in some communication between April and August 2006, there is disagreement about whether and to what extent the allegations of code violations were clearly spelled out; and whether Respondent's written responses to the allegations were satisfactory.³ The Department sent information requests sent to Respondent on May 3, July 10 and July 12, 2006.⁴ On May 16, Respondent submitted a written reply to the initial information request, stating that I & S Engineers, located in Mankato, Minnesota "will be certifying that the foundation is now and always was adequate."⁵ Neither party claims that this report was ever provided to the Department.

On August 16, 2006, the Department served Respondent with a Cease and Desist order pursuant to Minn. Stat. § 45.027, subd. 5a(a).⁶ The Cease and Desist order alleges that "neither Respondent nor its owner and qualifying person, James Peirce, are licensed plumbers or certified engineers."⁷ In addition, it alleges that Peirce stated on his building permit that "Nicollet Plumbing and Heating would perform all plumbing work on the Townhouse." The Order further alleges that "[t]he Department has since determined that Respondent performed all plumbing work on the Townhouse."⁸ As of the time of the Order, the Department alleges that Respondent was continuing with construction "without providing evidence regarding Building Code compliance and/or proof of corrective action."⁹

Based on the allegations it recites, the Cease and Desist order states three violations of licensing statutes and related provisions. Count I alleges a

¹ Memorandum of Department of Labor and Industry (D. Mem.), p.1

² D. Mem., Ex. 2

³ D. Mem., pp. 1-2; Respondent's Reply Memorandum (Reply), p.1, Ex. B

⁴ D. Mem., Ex. 3, paras. 5, 10 and 11

⁵ Reply, p.1, Ex. B

⁶ D. Mem., Ex. 3

⁷ D. Mem., Ex. 3, para. 1

⁸ Id., para. 4

⁹ Id., para. 12

failure to comply with the three information requests, in violation of Minn. Stat. §§ 45.027, subd. 1a and 326.91, subds. 1(5) and 2 (2004). Count II alleges a failure to comply with the Building Code in the design and construction of the Townhouse, thus demonstrating Respondent's untrustworthiness or incompetence in violation of Minn. Stat. §§ 45.027, subd. 7(a)(4) and 326.91, subd. 1(6) (2004). Count III alleges that, because Respondent performed plumbing work on the Townhouse without a plumber's license, Respondent "engaged in a fraudulent, deceptive or dishonest practice in violation of Minn. Stat. § 326.91, subd. 1(2) and Minn. Rule 2891.0040, subp. 1G (2005)."¹⁰

On September 19, 2006, the Department issued an Order to Show Cause and Statement of Charges requiring the Respondent to "show cause why its license, No. 20543696, should not be revoked or suspended, and why it should not be subject to censure or a civil penalty as provided for in Minn. Stat. § 45.027, subds. 6-7 (2004)." In addition to the violations enumerated in the Cease and Desist Order, the Order to Show Cause alleges that "Respondent violated the . . . Cease and Desist Order by continuing to cause, permit, or perform construction-related activities on the Townhouse," that "Respondent performed plumbing work on the Townhouse, even though it is not licensed as a plumber," and that "Respondent misrepresented to the Department that he was an engineer" and "provided false and misleading information to the Department and otherwise engaged in a deceptive or dishonest practice."¹¹

In December 2006, Respondent submitted a copy of a report by Acuity Engineers, Inc. which evaluated the Townhouse's compliance with 2003 International Residential Code ("IRC").¹² Mike Fricke, Building Code Representative for the Department, prepared a memorandum dated February 1, 2007 in response to Respondent's report stating, among other things, that the 2003 IRC "has not and will not be adopted as the State Building Code."¹³ The parties' reports differ as to whether the Townhouse meets State Building Code standards. Neither party has submitted evidence showing that the authors of these reports are "licensed structural engineers" as required by Minn. Stat. § 326.91, subd. 1 (7).

Legal Standard for Summary Disposition

Summary disposition is the administrative equivalent to summary judgment.¹⁴ Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.¹⁵ A genuine

¹⁰ Id., counts I, II, III

¹¹ Order to Show Cause, counts I, IV and VI.

¹² D. Mem., Ex. 5 and Report by Acuity Engineers dated Dec. 21, 2006 attached to R. Mem.

¹³ D. Mem., Ex. 5

¹⁴ Minn. R. 1400.5500 K.

¹⁵ Minn. R. Civ. P. 56.03

issue is one that is not a sham or frivolous, and a material fact is one which will affect the outcome of the case. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.¹⁶

The moving party must demonstrate that no genuine issues of material fact exist.¹⁷ If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.¹⁸ It is not sufficient for the nonmoving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.¹⁹ When considering a motion for summary judgment, the Judge must view the facts in the light most favorable to the non-moving party.²⁰ All doubts and factual inferences must be resolved against the moving party.²¹ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.²²

Legal Analysis

Respondent requests that the Administrative Law Judge dismiss this matter and lift the Cease and Desist order for lack of jurisdiction or require the Department of Labor and Industry to “submit proof of jurisdiction to administer and enforce the state building code in Nicollet, Minnesota” or dismiss the case and lift the cease and desist order for lack of any genuine issue of material fact.²³

It is not necessary to reach the question of the Department’s jurisdiction to administer the State Building Code in Nicollet, Minnesota at this time because the Department’s Order to Show Cause is based on violations of laws other than the State Building Code, including Minn. Stat. § 45.027, subds. 1a and 7(a)(2) (3) and Minn. Stat. § 326.91, subd. 1 (2) and (5) and subd. 2. These provisions all apply to Respondent’s alleged failure to comply with the Cease and Desist Order and with the requests for information and to inspect the premises, as well as the allegations of fraudulent and deceptive practices related to Respondent’s plumbing activities and statements about his engineering qualifications.²⁴

There are numerous genuine issues of material fact relating to Counts II, IV, V and VI. Respondent disputes that it continued to work on the Townhouse in

¹⁶ Minn. R. 1400.6600.

¹⁷ *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

¹⁸ *Highland Chateau v. Minn. Dept. of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

¹⁹ Minn. R. Civ. P. 56.05.

²⁰ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

²¹ *Theile v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

²² *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250-51 (1986).

²³ R. Mem., p. 1

²⁴ Order to Show Cause, counts I, II, IV, V and VI

violation of the [Cease and Desist] order.²⁵ Neither party has presented evidence on the allegation that Respondent actually did the plumbing work on the Townhouse nor has either party presented evidence about the Respondent's alleged misrepresentation of himself as an engineer. The only statements about the Respondent's qualifications as an engineer which are before this Administrative Law Judge at this time are unsupported allegations which have not been refuted by the Respondent.

Because there are a number of allegations in the Order to Show Cause which clearly give the Department and this court jurisdiction over this matter, and because there are numerous genuine issues of material fact relevant to those allegations, the Respondent's motion for summary disposition is DENIED.

R.R.K.

²⁵ Reply, p. 2